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FEDERAL ELECTION COMMISSION
SECRETARIAT

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2006 MAY -8 P 2: 23

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5588

DATE COMPLAINT FILED: October 28, 2004

DATE OF NOTIFICATION: November 4, 2004

LAST RESPONSE RECEIVED: January 4, 2005

DATE ACTIVATED: September 22, 2005

EXPIRATION OF SOL: October 22, 2009

COMPLAINANT:

James E. Pederson, Chairman
Arizona Democratic Party

RESPONDENTS:

Arizona Republican Party and Kirk Adams, in his
official capacity as treasurer¹

RELEVANT STATUTES:

2 U.S.C. § 431(17)
2 U.S.C. § 431(18)
2 U.S.C. § 434(b)(4)(H)
2 U.S.C. § 434(g)(1)(A)
2 U.S.C. § 441a(a)(2)(A)
2 U.S.C. § 441a(a)(7)(B)
2 U.S.C. § 441a(d)(2)
11 C.F.R. § 100.26
11 C.F.R. § 100.89
11 C.F.R. § 100.149
11 C.F.R. § 104.3
11 C.F.R. § 104.4
11 C.F.R. § 106.8
11 C.F.R. § 109.21
11 C.F.R. § 109.32
11 C.F.R. § 109.37

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

¹ A previous treasurer, Dennis Booth, was notified in his official capacity as treasurer at the time of the complaint. On March 13, 2006, the Arizona Republican Party amended its Statement of Organization naming Kirk Adams as treasurer.

I. INTRODUCTION

This matter involves an alleged coordinated expenditure by the Arizona Republican Party on behalf of President George W. Bush and Bush-Cheney '04.

The Complainant alleges that the Arizona Republican Party (the "ARP") funded "thousands" of pre-recorded telephone calls expressly advocating the re-election of President George W. Bush. These calls were placed on or about October 22, 2004. The following is a transcript of the telephone message:

Hello. This is Bob Fannin, Chairman of the Arizona Republican Party. I'm calling to remind you to mail in your early ballot. President Bush continues to offer a plan for a safer world and a more hopeful America. On the other hand, the Democrats and their allies have shown that they will stop at nothing to try to steal this year's election. Our signs have been vandalized and stolen, our offices broken into, and just today, one of our Arizona Republican County Headquarters received a bomb threat. Help us to put a stop to this type of politics by returning your early ballot today. Your vote matters. With your support, we are confident that President George W. Bush and our Republican team will be re-elected. This call was paid for by the Arizona Republican Party. Not authorized by any candidate or candidate's committee. On the web at www.azgop.org.

The Complainant alleges that funding for the telephone calls qualifies as either a contribution to (by means of a coordinated communication) or an independent expenditure on behalf of Bush-Cheney '04. Complainant also requests an investigation to determine whether Federal funds were utilized to finance the telephone calls, and whether the ARP properly and timely reported these disbursements as required by the Federal Election Campaign Act of 1971, as amended ("the Act").

The Respondents answered a portion of the complaint. First, the ARP insists that the Bush-Cheney '04 campaign had ceased all activity in Arizona at the time of the calls, and that the decision to engage in this activity was completely independent, with no coordination with

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1 President Bush, any agent for President Bush, or Bush-Cheney '04. Second, the ARP contends
2 that disbursements for the communication were from the ARP's Federal Victory Account and
3 reported in its December 2004 post-general report. The ARP does not address the alleged
4 independent expenditure reporting violations. Respondents request that the Federal Election
5 Commission ("the Commission") dismiss the complaint.

6 As described below, publicly available information indicates that the vendor the ARP
7 apparently paid for these telephone calls provided similar services to Bush-Cheney '04, raising
8 questions that warrant an investigation as to whether the calls may have been coordinated
9 through the common vendor. If the calls were coordinated, the ARP has made an excessive in-
10 kind contribution to Bush-Cheney '04. In the alternative, if the investigation fails to prove
11 coordination, the communication will instead be an independent expenditure by the ARP on
12 behalf of Bush-Cheney '04.

13 Therefore, for the reasons set forth below, we recommend that the Commission find
14 reason to believe that the Arizona Republican Party and Kirk Adams, in his official capacity as
15 treasurer, violated 2 U.S.C. § 441a(a)(2)(A) by making an excessive in-kind contribution to
16 Bush-Cheney '04, and violated 2 U.S.C. § 434(b)(4)(H) by failing to properly report the in-kind
17 contribution.

18 **II. FACTUAL AND LEGAL ANALYSIS**

19 **A. Disbursement for Telephone Calls**

20 Respondents claim that disbursements for the telephone calls were reported on the post-
21 general report. The post-general report indicates that the ARP paid FLS-DCI, LLC of St. Paul,

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MN, also operating as Feather, Larson & Synhorst ("Feather"),² \$13,613.55 for "party telemarketing" on October 21, 2004, \$14,025.76 for "absentee ballot chas" [sic] on October 27, 2004, and \$13,987.32 for "absentee ballot chas" [sic] on November 10, 2004, for a total of \$41,626.63. These appear to be the disbursements to which the response refers.

This is the first enforcement matter to present issues under 11 C.F.R. § 106.8, the regulation governing allocation of expenses for party committee phone banks that refer to a single clearly identified Federal candidate. That regulation provides a framework for discussing most of the issues in this case. Accordingly, we turn first to the allocation issue.

B. Allocation

Section 106.8 of the Commission's regulations applies to the costs of any phone bank communication conducted by a national, State, district, or local committee or organization of a political party if the communication: (1) refers to a clearly identified Federal candidate; (2) does not refer to any other clearly identified Federal or non-Federal candidate; (3) includes another reference that generically refers to other candidates of the Federal candidate's party without clearly identifying them; (4) does not solicit a contribution, a donation, or any other funds from any person; and (5) does not qualify as exempt activity under the specific exceptions for the definitions of contribution and expenditure for voter registrations and get-out-the-vote drives conducted on behalf of the party's Presidential and Vice Presidential nominee, as set forth at 11 C.F.R. §§ 100.89, 100.149, and 106.8(a).

The Complainant alleges that the ARP funded "thousands" of pre-recorded telephone calls advocating the re-election of President Bush immediately prior to the November 2004

² See *Feather, Larson & Synhorst*, <http://www.sourcewatch.org> and <http://www.FLS-DCI.com> for further information about FLS-DCI, Inc. and Feather, Larson, & Synhorst.

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election. The ARP admits to funding the communication, and the post-general disclosure report reveals significant disbursements consistent with this admission. Based on this information, it appears that the ARP utilized a phone bank as defined by 11 C.F.R. § 100.28 (more than 500 telephone calls of an identical or substantially similar nature within any 30-day period). The telephone calls clearly identify President Bush. The communication transmitted by the ARP does not solicit a contribution, donation or any other funds. The communication does not refer to any other clearly identified Federal or non-Federal candidate, but it does generically refer to other candidates of President Bush's party (the Republican Party) when it calls for the election of the "whole Republican team." Finally, the telephone calls do not qualify as "exempt activity" under the exemptions of 11 C.F.R. §§ 100.89 and 100.149. Phone banks qualify as "exempt activity" under those regulations only if volunteer workers operate the phone banks. The phone bank here is a recorded message apparently distributed through a commercial vendor. Thus, 11 C.F.R. § 106.8 applies to these calls. Accordingly, the entire cost of the calls must have been paid with Federal funds. Fifty percent of the disbursement is attributable to President Bush's campaign either as an in-kind contribution, a coordinated party expenditure, an independent expenditure, or a disbursement reimbursed by the Bush campaign. 11 C.F.R. § 106.8(b). The remaining fifty percent is not attributable to any specific Federal candidate. *Id.*

There is no available information suggesting that the ARP utilized non-Federal funds to pay for the communication. Schedule B of the post-general report confirms the disbursements from Federal funds, and there is no corresponding Schedule H, which is required if the disbursements are allocated between Federal and non-Federal funds. There is also no indication that the cost of the phone banks was reimbursed. Thus, we turn to a discussion of whether the phone banks were coordinated or independent expenditures.

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C. Party Coordinated Communication

The Act defines a coordinated communication as one that is “in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committee, or their agents...” 2 U.S.C. § 441a(a)(7)(B)(i). A political party communication is coordinated with a candidate, a candidate’s authorized committee, or agent of the candidate or committee when the communication satisfies the three-prong test set forth in 11 C.F.R. § 109.37.

First, a political party committee or its agent must pay for the communication. 11 C.F.R. § 109.37(a)(1). Second, the communication must satisfy at least one of the content standards described in 11 C.F.R. § 109.37(a)(2). Finally, the communication must satisfy at least one of the conduct standards in 11 C.F.R. § 109.21(d)(1) through (d)(6).³ 11 C.F.R. § 109.37(a)(3). A payment by a political party committee for a communication that is coordinated with a candidate, and that is not otherwise exempted,⁴ must be treated by the political party making the payment as either an in-kind contribution to the candidate with whom it was coordinated or a coordinated party expenditure subject to limitations set forth in 11 C.F.R. § 109.32. 11 C.F.R. § 109.37(b).

1. Payment

The payment prong of the party coordinated communication test is satisfied. The ARP admits that it paid for the communication. As previously mentioned, the post-general disclosure report identifies disbursements consistent with this admission. However, to constitute coordination the communication must also satisfy content and conduct standards set forth in the Commission’s regulations at 11 C.F.R. § 109.37(a)(2) and (3).

³ Although the criteria for a party coordinated communication are set forth in 11 C.F.R. § 109.37, the conduct standards are the same as those established in 11 C.F.R. § 109.21, the Commission’s regulations regarding coordinated communications not paid for by a party committee.

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2. Content

The content prong is satisfied if the communication at issue meets at least one of three content standards described in 11 C.F.R. § 109.37(a)(2)(i) through (a)(2)(iii):

- (i) A public communication that republishes, disseminates or distributes campaign materials prepared by the candidate, the candidate's committee, or the candidate's agent;
- (ii) A public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; or
- (iii) A public communication that refers to a clearly identified federal candidate; is publicly distributed or disseminated 120 days or fewer before a primary or general election or convention or caucus with the authority to nominate a candidate; and is directed to voters in the jurisdiction of the clearly identified candidate.⁵

The content prong of the test for coordination appears to be satisfied. The telephone calls are a public communication by means of a telephone bank (more than 500 telephone calls of an identical or substantially similar nature within any 30-day period).⁶ 11 C.F.R. § 100.28. Also, the message of the telephone calls expressly advocates the re-election of President Bush. "Expressly advocating" means any communication that uses phrases such as "vote for the President," "re-elect your Congressman," "support your Democratic nominee," or "cast your ballot for the Republican challenger," or the use of campaign slogans or individual words, which

⁴ The Commission's regulations exempt from the definition of "contribution" and "expenditure" those activities described in 11 C.F.R. part 100, subparts C and E.

⁵ Both the "content prong" and the "conduct prong" of 11 C.F.R. § 109.37 actually incorporate by reference certain provisions of the similar 11 C.F.R. § 109.21, relating to coordinated communications made by spenders other than party committees. Recently, in response to *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), the Commission approved revisions to 11 C.F.R. § 109.21. The *Shays* litigation did not directly involve 11 C.F.R. § 109.37, and the revisions recently approved by the Commission to 11 C.F.R. § 109.21 were not retroactive. Thus, we apply here the law as it existed at the time of the activity in question. Moreover, it does not appear that the new rules would change the result or the analysis of this case, even if applied retroactively.

⁶ A public communication is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

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in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates. 11 C.F.R. § 100.22(a). Specifically, this message urged voters to “mail in your early ballot” and further stated “with your support, we are confident that President George W. Bush and our Republican team will be re-elected.” Finally, the telephone calls involved in this communication were disseminated approximately twelve days prior to the general election, and directed to Arizona voters clearly within the jurisdiction of President Bush.

However, even though the content prong of the test for coordination appears to be satisfied, in order to be considered coordinated, the communication must also satisfy the conduct standard described below.

3. Conduct

The conduct standard, the third prong of the coordination test, may be satisfied by affirmative acts that fall into six general categories described in 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.37(a)(3). Among these is the use of a common vendor.⁷ See 11 C.F.R. § 109.21(d)(4). The Explanation and Justification makes clear that this category does not presume coordination from the mere presence of a common vendor. See 68 Fed. Reg. 436 (Jan. 3, 2003). The use of a common vendor in the creation, production or distribution of a communication satisfies the conduct standard only if certain criteria are met, namely:

- (i) The person paying for the communication contracts with, or employs, a commercial vendor⁸ to create, produce or distribute the communication;
- (ii) The commercial vendor, including any officer, owner or employee of the vendor, has a previous or current relationship with the candidate that puts

⁷ The other conduct standards are. request or suggestion; material involvement; substantial discussion; former employee or independent contractor; and dissemination, distribution, or republication of campaign material. 11 C.F.R. § 109.21(d)(1)-(3), (5)-(6).

⁸ A commercial vendor means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services 11 C.F.R. § 116.1(c).

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the commercial vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate. This previous relationship is defined in terms of specific services related to campaigning and campaign communications and these services would have to have been rendered during the election cycle in which the communication is first publicly distributed;⁹ and

- (iii) The commercial vendor uses or conveys information about the campaign plans, projects, activities or needs of the candidate or political party committee, or information previously used by the commercial vendor in serving the candidate or political party committee, to the person paying for the communication, and that information is material to the creation, production or distribution of the communication.

The ARP apparently paid Feather for the distribution, and possibly the production, of these telephone calls. *See* 11 C.F.R. § 109.21(d)(4)(i). According to disclosure reports filed by Bush-Cheney '04, Feather also received more than \$3.5 million from Bush-Cheney '04 for "message phone calls" during the 2004 election cycle. Indeed, the company's own website claims that they have provided services to their clients, including Bush-Cheney '04, such as fundraising, voter identification, and "well-written advocacy messages," all services enumerated in the regulations as those subject to the common vendor provisions of the coordination regulation. *See* 11 C.F.R. § 109.21(d)(4)(ii). While we are not absolutely certain what services are encompassed in "message phone calls," it would seem reasonable to infer, based on the facts set forth, that those services may have included content development or production for the "message phone calls." Assuming that the Bush-Cheney '04 "message phone calls" were public communications, the second part of the common vendor standard--a relationship between the candidate, or the candidate's committee, and the vendor that would allow the vendor to acquire

⁹ These services include: (A) development of media strategy, including the selection or purchasing of advertising slots; (B) selection of audiences; (C) polling; (D) fundraising; (E) developing the content of a public communication; (F) producing a public communication; (G) identifying voters or developing voter lists, mailing lists, or donor lists; (H) selecting personnel, contractors, or subcontractors; or (I) consulting or otherwise providing political or media advice. 11 C.F.R. § 109.21(d)(4)(ii)(A)-(I).

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1 information about the campaign plans, projects, activities or needs of the candidate or political
2 party committee--appears to be satisfied. *See* 11 C.F.R. § 109.21(d)(4)(ii).

3 Because the ARP utilized a vendor that we believe provided certain enumerated services
4 to the clearly identified candidate, President Bush, there is reason to investigate whether the use
5 or exchange of information occurred as described in 11 C.F.R. § 109.21(d)(4)(iii). If an
6 investigation reveals the exchange of information, all three parts of the coordination test will be
7 met, and fifty percent of the cost for the communication, or \$20,813.32, will constitute either an
8 in-kind contribution to Bush-Cheney '04, or a coordinated party expenditure pursuant to
9 coordinated party expenditure authority under 11 C.F.R. § 109.32, in connection with the general
10 election campaign of President Bush. *See* 11 C.F.R. §§ 106.8, 109.37(b)(1), (2); 2 U.S.C.
11 § 441a(d).

12 Because the ARP is a State committee of a political party, it has no authority under
13 2 U.S.C. § 441a(d)(2) or 11 C.F.R. § 109.32(a) to make a coordinated party expenditure in
14 connection with the general election campaign of any candidate for President of the United
15 States. However, the National committee of a political party may assign its authority to make
16 coordinated party expenditures to the State political party. 11 C.F.R. § 109.33(a). This
17 authorization must be in writing, must state the amount of the authority assigned, and must be
18 received by the assignee committee, in this case the ARP, before any coordinated party
19 expenditure is made pursuant to the assignment. *Id.* Here, the ARP does not indicate that it
20 received authority from the National committee. There are also no other reported coordinated
21 party expenditures by the ARP on behalf of Bush-Cheney '04. Because we believe that there was
22 no such assignment of authority, \$15,813.32, the amount in excess of the ARP's contribution
23 limit, would, if the phone banks were coordinated, constitute an excessive in-kind contribution in

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1 violation of 2 U.S.C. § 441a(a)(2)(A). Moreover, if fifty percent of the disbursement is
2 determined to be an in-kind contribution, the ARP would have violated 2 U.S.C. § 434(b)(4)(H),
3 by not reporting the disbursement as a contribution. While the ARP itemized the disbursements
4 for the telephone bank on Schedule B of the post-general report, it reported the disbursement as
5 an operating expense, not as a contribution made.

6 Accordingly, we recommend that the Commission find reason to believe that the Arizona
7 Republican Party and Kirk Adams, in his official capacity as treasurer, violated 2 U.S.C.
8 § 441a(a)(2)(A) by making an excessive contribution resulting from a party coordinated
9 communication. Also, we recommend that the Commission find reason to believe that the
10 Arizona Republican Party and Kirk Adams, in his official capacity as treasurer, violated
11 2 U.S.C. § 434(b)(4)(H) by failing to report an in-kind contribution to Bush-Cheney '04.

12 While the communication may be a contribution from the ARP to Bush-Cheney '04, it is
13 not necessarily a contribution received by Bush-Cheney '04. An in-kind contribution resulting
14 from a coordinated communication through a common vendor is not considered received or
15 accepted by the clearly identified candidate or his authorized committee unless there is conduct
16 consistent with that described in 11 C.F.R. § 109.21(d)(1)-(3). 11 C.F.R. § 109.37(a)(3). At this
17 time, there is insufficient information to suggest that President Bush or Bush-Cheney '04
18 requested or suggested the communication, became materially involved in the communication, or
19 participated in substantial discussion about the communication. The ARP denies that there was
20 any participation by Bush-Cheney '04. However, it is possible that an investigation may indicate
21 otherwise. Accordingly, we make no recommendation at this time regarding Bush-Cheney '04.

D. Independent Expenditure

In the alternative, if the fifty percent of the disbursement allocable to Bush-Cheney '04 was not coordinated, it would be an independent expenditure by the ARP on behalf of Bush-Cheney '04. An independent expenditure is for a communication "expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17)(A). Further, the communication is not made in cooperation or consultation with the candidate. 2 U.S.C. § 431(17)(B).

The Act requires that independent expenditures by a political committee on behalf of a Federal candidate be reported as such. If the communication is determined to be an independent expenditure, the ARP did not comply with these reporting requirements.

A political committee must report independent expenditures that exceed \$200, or one which when added to previous independent expenditures on behalf of the same candidate aggregates over \$200, during the calendar year. 2 U.S.C. § 434(b)(4)(H)(iii). The committee is to report the expenditure on Schedule E of FEC Form 3X at the end of the first reporting period following the expenditure. 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a). To comply with this requirement, the post-general report filed by the ARP should have included a Schedule E itemizing fifty percent of the cost of the communication as an independent expenditure on behalf of President Bush. As noted, the ARP disclosed on Schedule B its payments for the telephone calls. However, the ARP did not disclose the payments as independent expenditures on Schedule E. Failure to comply with this reporting requirement is a violation of 2 U.S.C. § 434(b)(4)(H)(iii).

Further, any independent expenditure of \$1,000 or more, or independent expenditures aggregating \$1,000 or more, contracted or made after the twentieth day, but more than twenty-

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four hours, before the day of an election must be reported within twenty-four hours after the expenditure is made. 2 U.S.C. § 434(g)(1)(A); 11 C.F.R. §§ 104.4(b)(1), 109.10(d). The report must contain the same information that would be required on Schedule E. See 11 C.F.R. § 104.3(b). To comply with this requirement, the ARP should have reported the expenditure within twenty-four hours. The ARP did not report the disbursement for the communication within twenty-four hours. If the communication is an independent expenditure, failure to report the disbursement within twenty-four hours is a violation of 2 U.S.C. § 434(g)(1)(A).

III. PROPOSED DISCOVERY

IV. RECOMMENDATIONS

1. Find reason to believe that the Arizona Republican Party and Kirk Adams, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) and 2 U.S.C. § 434(b)(4)(H), or in the alternative 2 U.S.C. § 434(g)(1)(A).
2. Approve the attached Factual and Legal Analysis.
- 3.

4. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

Date

5/5/06

BY:

Lawrence L. Calvert, Jr.
Deputy Associate General Counsel
for Enforcement

Cynthia E. Tompkins
Assistant General Counsel

Wanda Brown
Law Clerk

Attachment:

Factual and Legal Analysis

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